The law as stated in *Litchfield* v *Dreyfus*[3] was not challenged by counsel for the defendant. In that case, Farwell J (at p 589), in relation to the Moneylenders Act 1900, said:

> But not every man who lends money at interest carries on the business of moneylending. Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a moneylender can evade the Act by limiting his clientele to those whom he chooses to designate as 'friends' or otherwise: it is a question of fact in each case.

The above statement was accepted by Walton J in *Newton* v *Pyke*[1] who went on to say that 'it was not enough merely to show that a man had on several occasions lent money at remunerative rates of interest; there must be a certain degree of system and continuity about the transactions.'

Both decisions were followed in Singapore by Spenser-Wilkinson J in *Esmail Sahib* v *Noordin*.[2] In that case, the judge also commented on the difference between the English Act and the Singapore Ordinance as follows:

> There is however one important difference between the English law on this subject and the local law. Section 3 of the Moneylenders Ordinance reads as follows:
>
> 3 Save as excepted in paragraphs (a), (b), (c), (d) and (f) of the definition of 'Moneylender' in section 2, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed, until the contrary be proved, to be a moneylender.
>
> Counsel were unable to cite any local authority which could assist me in determining the effect of this section and I have been in some doubt as to the extent of the burden of proof cast by this section upon a plaintiff who has in fact lent money at interest. It is difficult to see how else a plaintiff can discharge this burden except by himself giving evidence to the effect that he is not a moneylender and by submitting to cross-examination on the point.

The settled law is that what is prohibited by the Act was not moneylending but the business of moneylending. This is a question of fact. It is also settled law that the giving of a number of loans to friends does not constitute the business of moneylending, unless there is a system and continuity about the transactions. In *Litchfield* v *Dreyfus*,[3] Farwell J said (at p 590):

> ... it would be a straining of the language of the Act to hold that a man who so obliges friends is carrying on the business of a moneylender. The Act was intended to apply only to persons who are really carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. The particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called moneylenders as an offensive term. Moneylending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money.

In the present case, the defence was no defence. The loans were friendly loans between two long-time friends. Interest was not demanded but accepted when offered. The interest was not exorbitant and varied in accordance with the generosity of the defendant. The plaintiff did not lend to all and sundry. On these facts, there was no question of the plaintiff being a moneylender as defined in the Act. If there had been a trial, the result would have been the same.

That being the legal position, the registrar's decision to give unconditional leave to defend could not be right. The registrar's approach implied that the statutory presumption that the plaintiff was a moneylender (which was a rebuttable presumption) could not be rebutted at that stage of the proceedings but only at the trial. There is no such rule. It was a question of evidence, and on the evidence before the registrar, the plaintiff was, in law, not a moneylender. The other admitted facts were sufficient to rebut the presumption.

The appeal was accordingly allowed and final judgment given for the plaintiff.

Appeal allowed.

Solicitors: *Tan Rajah & Cheah; Gurdaib & Co.*

Reported by *Azra Moiz*

Malayan Banking Bhd v Kim Produce Pte Ltd & Ors and another action

HIGH COURT (SINGAPORE) — SUIT NOS 1979 OF 1981 AND 1980 OF 1981
SINNATHURAY J
19 JANUARY 1991

Banking — Guarantee — Execution of guarantee by guarantors — Rescission — Misrepresentation — Plea of non est factum

Contract — Rescission — Misrepresentation — Plea of non est factum

The plaintiffs, Malayan Banking Berhad, brought two actions, which are consolidated in this action against Ong Chi Hui @ Ong Sing Chiat @ Ong Yue Hwee ('Ong') and Loi Sai Kwang ('Loi') as guarantors under two letters of guarantee. Ong is the fifth defendant in Suit No 1979 of 1981 ('the first suit') and the third defendant in Suit No 1980 of 1981 ('the second suit'). Loi is the sixth defendant in the first suit and the fourth defendant in the second suit. In both the actions Ong and Loi gave guarantees in favour of Kim Produce Pte Ltd ('Kim Produce'), the principal debtor in the first suit and T Bin (Singapore) Pte Ltd ('T Bin'), the principal debtor in the second suit. The two guarantees were given in consideration of the plaintiffs granting credit facilities to Kim Produce and T Bin. The plaintiffs had already obtained judgment against Kim Produce and T Bin in respect of moneys owing to the plaintiffs and the sole issue was the question of liability or otherwise of Ong and Loi under the two guarantees to make good the sums owed by Kim Produce and T Bin. The applications were made on Kim Produce and T Bin's behalf by

their managing director, Hasannudin Guntur @ Felix Lui ('Lui'). The plaintiffs gave the guarantee documents to Lui who obtained the signatures of Ong and Loi as guarantors in respect of credit facilities granted to Kim Produce and T Bin.

Held, allowing the plaintiffs' claim against Ong and dismissing the plaintiffs' claim against Loi:

(1) Loi had misplaced his faith in Lui who was an untrustworthy person. There had been an inequality of bargaining power between Loi and Lui, and also between Lui and the plaintiffs. Loi did not have the benefit of independent legal advice and the circumstances in which the Plaintiffs obtained Loi's signatures on the letters of guarantee were unfair to him. Hence the principles in the *Avon Finance* case applied to absolve Loi.

(2) Ong, on the other hand, was an experienced businessman who in the course of his business signed many guarantees. In the instant case, he knew he was signing letters of guarantee and knew what guarantees were all about. There were also material contradictions between Ong's testimony and his son's testimony which were not reconcilable. There was no inequality of bargaining power and the principles in the *Avon Finance* case and the plea of non-est factum were not available to Ong.

Cases referred to

1 *Avon Finance Company Ltd* v *Bridger & Anor* [1985] 2 All ER 281 (folld)
2 *Kingsnorth Trust Ltd* v *Bell & Ors* [1986] 1 All ER 423 (refd)
3 *Saunders* v *Anglia Building Society* [1970] 3 All ER 961 (refd)
4 *United Dominions Trust Ltd* v *Western* [1976] 2 WLR 64; [1975] 3 All ER 1017 (refd)

Sarjit Singh Gill for the plaintiffs.

Cheong Yuen Hee (*Mary Leong* with him) for the fifth and sixth defendants in Suit No 1979 of 1981 and for the third and fourth defendants in Suit No 1980 of 1981.

Cur Adv Vult

Sinnathuray J: In these two actions, which have been consolidated, Malayan Banking Berhad (the plaintiffs) claim against Ong Chi Hui @ Ong Sing Chiat @ Ong Yue Hwee ('Ong') and Loi Sai Kwang ('Loi') under two letters of guarantee dated 28 March 1980 and 23 June 1980 respectively.

Ong is the fifth defendant in Suit No 1979 of 1981 and the third defendant in Suit No 1980 of 1981; Loi is the sixth defendant in Suit No 1979 of 1981 and the fourth defendant in Suit No 1980 of 1981. Ong and Loi were sued by the plaintiffs jointly and severally as guarantors under the two guarantees.

The background

In Suit No 1979 of 1981, the principal debtor was the first defendant, Kim Produce Pte Ltd ('Kim Produce'), and the amount it owed the plaintiffs at the material time was S$220,439.08; in Suit No 1980 of 1981, the principal debtor was the first defendant, T Bin (Singapore) Pte Ltd ('T Bin'), and the amount it owed the plaintiffs at the material time was S$434,412.16. The plaintiffs had already obtained judgment against both Kim Produce and T Bin. In addition, they had also obtained judgment against the third and fourth defendants in Suit No 1979 of 1981, and against the fifth defendant in Suit No 1980 of 1981.

The plaintiffs, however, were unable to serve the writs on the second defendant in both these actions, Hasannudin Guntur @ Felix Lui ('Lui'). Up to the date of trial, Lui's whereabouts were unknown. It is believed that he had absconded from Singapore some time in April 1981. At the material time, Lui was the managing director of both the companies, Kim Produce and T Bin.

The two guarantees were given in consideration of the plaintiffs granting credit facilities to Kim Produce and T Bin. At the request of the principal debtors, the plaintiffs had opened confirmed irrevocable letters of credit in favour of the parties named therein. These letters of credit were available by drafts drawn on the principal debtors and accompanied by the requisite documents. The sums owing in both these actions are in respect of drafts drawn on the principal debtors under the said letters of credit which had been duly negotiated by the plaintiffs. The drafts were subsequently accepted by the principal debtors. After the principal debtors had executed trust receipts in favour of the plaintiffs, the requisite documents which were presented to the plaintiffs were released back to the principal debtors.

The issues

In both these actions the plaintiffs asserted that Ong and Loi had signed the continuing guarantees in writing in their favour for the purposes that I have just mentioned.

I should point out that the sums owed to the plaintiffs by Kim Produce and T Bin were never in dispute. The sole issue before me was the question of the liability or otherwise of Ong and Loi under the two guarantees to make good the sums owed by Kim Produce and T Bin.

Briefly, Loi's defence was that he had signed the two guarantees under circumstances which showed that there had been inequality of bargaining power between the parties which was sufficient to vitiate his liability under the two guarantees. Ong's defence, on the other hand, was that Lui had misrepresented to him the extent of his liability.

The plaintiffs' claim

At the trial, the plaintiffs called two witnesses, namely their manager, Khoo Teck Siew (PW1) and their clerk, Tan Peh Suan (PW2). PW1, who was the plaintiffs' main witness, gave evidence that he handled all applications for credit facilities. In particular, he handled the

applications for credit facilities by both Kim Produce and T Bin some time at the end of March 1979. The applications were made on their behalf by their managing director, Lui. Pursuant to these applications the plaintiffs subsequently offered credit facilities to the extent of S$1.2m to Kim Produce and S$1.4m to T Bin. These credit facilities were duly accepted by the directors of both Kim Produce and T Bin as evidenced by their board resolutions.

As regards the facilities granted to Kim Produce, the plaintiffs' case was that PW1 told Lui to inform all the directors of Kim Produce to attend at the plaintiffs' banking office to sign the letters of guarantee. According to PW1, Lui said Ong would not like that as he was a busy man. PW1 then gave the guarantee documents to Lui for the latter to obtain the signatures of all the guarantors. PW1 said he was not told anything about Loi at that time, though he had been informed that the third and fourth defendants were in Indonesia. PW1 also testified that it was normal for wealthy and busy businessmen not to go to the bank to sign documents. PW1 knew that Ong owned several companies and was a wealthy businessman.

Subsequently, on 28 March 1980 Lui returned to PW1 the guarantee in respect for the credit facilities given to Kim Produce. It had been signed by Ong, Loi, the third and fourth defendants and Lui. PW1 said that the typewritten words and figures on the guarantee had been filled in before it was given to Lui to obtain the signatures of the guarantors. He said it was done by PW2 who subsequently gave evidence confirming that she had typed the particulars of the credit facilities which the plaintiffs had granted to Kim Produce onto the letter of guarantee. She had prepared them before they were given to PW1.

On 28 March 1980, after Lui returned the guarantee to PW1, PW2 typed out the date, PW1's name and the particulars of the directors. PW1 then signed the guarantee. PW1 said that it was the practice of the plaintiffs to date the guarantee according to the day on which it was returned to the bank after having been signed by the guarantors.

On the letter of guarantee, PW1 stated categorically that when he handed the guarantee document to Lui to obtain the signatures of Kim Produce's directors, he did not authorize Lui to make any representations on behalf of the plaintiffs.

With regard to the banking facilities granted to T Bin, PW1 said that as in the case of Kim Produce, the directors of T Bin were requested to go to the plaintiffs' banking premises to sign the letter of guarantee. Again PW1 was told by Lui that Ong would not like to do that, and that the fifth defendant was then in Indonesia. PW1 then gave Lui the guarantee document for him to obtain the signatures of T Bin's directors. Subsequently on 23 June 1980, Lui returned the letter of guarantee to PW1. It had been signed by Ong, Loi, the fifth defendant and Lui. As in the previous instance, before Lui took the letter of guarantee with him, the relevant particulars had been typed out. And when Lui returned the guarantee, PW1 dated it on that day and then signed it. PW1 said he did not authorize Lui to make any statements or representations on the plaintiffs' behalf.

Several months later, after Kim Produce had incurred the debts amounting to the sum claimed by the plaintiffs, Ong wrote to the plaintiffs on 16 January 1981 requesting that he be released from his liabilities as a guarantor as he had resigned his directorship of Kim Produce since 8 December 1980. As a matter of course, PW1 referred Ong's letter to the plaintiffs' solicitors. They were instructed to and did reply to the effect that the plaintiffs could not release Ong from his liabilities as a guarantor unless Kim Produce settled all its outstanding liabilities in full.

Some time later, the plaintiffs received a letter dated 25 February 1981 from Loi. The letter was written in Chinese. Loi informed the plaintiffs that on 20 February 1981 he had resigned as a director of Kim Produce as well as T Bin. He wanted to withdraw as a guarantor in respect of the banking facilities granted by the plaintiffs to Kim Produce and T Bin. He expressed the hope that his request to be released would be acceded to by the plaintiffs. When Loi's letter was referred to PW1, he got the plaintiffs' accountant to reply to the effect that he could not be released from his liabilities as a guarantor in respect of the credit facilities granted to Kim Produce and T Bin unless and until all the outstanding liabilities which they had incurred were fully settled. The letter also detailed the sums owed to the plaintiffs.

On a general matter, PW1 maintained that his relationship with Lui was that of a banker and a customer; they were not personal friends. Although he had gone on an overseas trip with Lui once, PW1 said he had paid for his own expenses on that trip.

In cross-examination, PW1 said that he regarded himself as a careful bank manager. PW1 agreed that there would be a risk where the signature of the guarantor had not been witnessed by a bank officer as the bank could not then verify that signature. He conceded that there would be a risk if the guarantor did not understand or read English. He also agreed that in the case of a guarantor who did not read English, if the guarantee document did not contain Chinese characters, there was the possibility that the person who procured the signature might misrepresent the nature of that document. In this case, however, there were three Chinese characters written on the top of the guarantee documents and they read 'Letter of Guarantee'.

Concerning his knowledge of Loi, PW1 said that he was told by Lui that Loi was a cousin of his. He was aware that Loi owned a sundry goods shop and that he was not worth $2m, but the plaintiffs had not carried out any independent checking.

On the subject of loans, PW1 said that the plaintiffs acted on his recommendations as to whether or not banking facilities ought to be granted to their customers.

Loi's defence

Loi gave evidence in his own defence. He was born in China, and came to Singapore at the age of ten in 1938. He had only obtained primary school education in China. After arriving in Singapore, he went to Johore and lived there until 1963 when he came to Singapore to settle permanently. He did not continue his studies after he left China. He knew some romanized Malay but was illiterate in English. In Singapore, he operated a small sundry goods shop in Jalan Eunos.

At the material time, in 1980, the estimated value of his sundry goods shop, including his stock in trade, was about $50,000. Loi did not have any other asset. He confirmed that Lui was a relative of his; they both belonged to the same clan.

Some time in January 1980, Lui came to see him. He wanted Loi to become a 'sleeping' director in Kim Produce and T Bin. According to Loi, Lui said that as an Indonesian national he was not allowed to incorporate these two companies in Singapore and he needed to use Loi's name to do so. Lui offered Loi $200 a month as a director for each of the two companies. Loi said he accepted because Lui was his relative and a wealthy man. Thereafter, Lui would come to see him from time to time in connection with the business of the two companies.

Loi said that on 27 March 1980, Lui came to his shop at about 8pm. He brought with him documents which he told Loi were in connection with the companies' business. Lui told Loi to sign the documents and he did so, but he could not remember how many documents he signed that evening. Lui then went away with them. Loi said there were many documents of various sizes which accompanied the documents he signed.

Nothing eventful happened until 1981 when Loi received a letter written in English on 13 February 1981. Being unable to read English, Loi got one of his customers to read it for him. When the contents of the letter was explained to him, Loi was shocked because it was only then that he realized that he had become indebted to the plaintiffs. Immediately, Loi contacted Lui by telephone and informed him about the letter. Lui dismissed the matter as trivial and told Loi not to worry about it. He promised he would sort things out with the bank.

After that telephone conversation, Loi's mind was still not at ease, and that same evening he called at Lui's residence. Lui was at home. Loi enquired as to why the plaintiffs should send him that letter and how was it that they were able to get hold of his name and particulars. It was only then that Lui told Loi that he had stood as a guarantor in favour of the plaintiffs. Loi became very worried and disturbed. However, Lui kept on reassuring him that he had nothing to fear and that he (Lui) would settle the matter with the plaintiffs. Loi then asked Lui whether in addition to that particular guarantee he had signed any other. Lui, he said, apologized and replied in the affirmative. Loi then pressed him and was told that he had signed another guarantee in favour of the plaintiffs. According to Loi, Lui refused to elaborate how many other guarantees he (Loi) had signed.

After hearing all this, Loi became angry and told Lui that he would resign as a director of both Kim Produce and T Bin. In fact, Loi did resign. He got someone to write his letter of resignation in English for him on 19 February 1981. Loi handed the letter personally to the accountant/secretary of Kim Produce and T Bin. Following that, he wrote the letter dated 25 February 1981 in Chinese addressed to the plaintiffs which I have already referred to.

On 18 April 1981, Loi called at the plaintiffs' banking premises personally. It was a Saturday and he was told to come back on Monday. Loi met PW1 on Monday. He explained to PW1 that he was merely a 'sleeping' director of Kim Produce and T Bin. He wanted to know why he was not allowed to withdraw as a guarantor. He told PW1 that he was only a small-time businessman and wondered how it was that he had ended up being a guarantor for such a large sum of money. According to Loi, PW1 was sympathetic towards his predicament but said it was too late in the day for him to withdraw as a guarantor. When questioned as to how he (Loi) had signed the letters of guarantee in favour of the plaintiffs when he never visited the bank for that purpose, PW1 replied that the letters of guarantee had been handed to Lui to obtain the signatures of the directors of the two companies.

Under cross-examination, Loi denied that Lui had told him that Ong had also agreed to stand as a guarantor for Kim Produce and T Bin. Loi said he did not read the contents of the letters of guarantee. He had not noticed that below the plaintiffs' name were three Chinese characters which read 'Letter of Guarantee'. Loi claimed to remember that except for two signatures there were blanks in the guarantee documents. Notwithstanding that, he signed the documents because he was an ignorant man. When Lui told him to sign the

documents as relating to the companies' affairs, he obliged him as he was a director. When pressed as to the date on which the first guarantee was signed by him, Loi said he could not remember it.

In an effort to corroborate Loi's evidence of how he came to sign the letters of guarantee, Tan Ken Hoo (DW 2) gave evidence. He said he used to supply goods to Loi. On 27 March 1980, he had gone to Loi's shop at around 8pm to deliver some goods. Whilst there, he saw Loi approach a man who handed some documents to him. DW2 said Loi signed the documents. This man then left the shop.

Ong's defence

Ong also gave evidence in his own defence. He said he knew Lui's father since 1949. They had met in Surabaya. Ong had been a schoolteacher in a Chinese middle school in Surabaya. He taught both English and Chinese. Lui's father was his neighbour.

By 1980, Lui's father had become Ong's close friend. Some time at the end of December 1979, after much persuasion by Lui, Ong became a director of Kim Produce and T Bin. However, Ong had no shares in these two companies.

On 5 March 1980, Lui came to Ong's residence at about 7.30am. He brought along some documents. Ong knew that these documents were bank guarantees. Lui wanted him to sign as one of the guarantors for the banking facilities granted to Kim Produce and T Bin. Ong said he was reluctant to sign the guarantees as he did not own any share in these two companies. Lui, however, persuaded him that the banking facilities were only for $200,000 in respect of Kim Produce and $350,000 in respect of T Bin. Lui then showed Ong two photocopies of fixed deposit certificates which would be placed with the plaintiffs as security for these credit facilities. Ong was assured by Lui that he would not be liable for these guarantees as the sums in question were fully secured. Thereupon, Ong signed both guarantees. When he signed them, his son Ong Yong Sing (DW 3) and one Junji Matsomoto were present.

Ong confirmed his signature on the third page of each of the two letters of guarantee. He did not sign the guarantees in front of PW1 whose signature had not been penned when he signed them.

Ong resigned as a director of Kim Produce and T Bin on 8 December 1980. He said he did so because he had heard rumours about Lui mismanaging the two companies. Ong also wrote to the plaintiffs to inform them that he had resigned his directorship of Kim Produce and T Bin. On or about 21 January 1981 he telephoned PW1 and requested a copy each of the guarantees that he had signed. PW1 refused to oblige him. He insisted that Ong wrote in to the plaintiffs officially. Ong said he wanted to know why he had become liable for such a large sum of money. According to him, he was unaware that the plaintiffs had given credit facilities far in excess of the sums he was supposed to have guaranteed.

From the cross-examination, it was clear to me that Ong was quite familiar with guarantees and security deposits upon which banking facilities were offered by banks. In fact, Ong had stood as a guarantor for the sum of $2m in respect of certain banking facilities granted to one of his companies.

Ong said that in all his experience with bank guarantees, invariably he was required to attend at the various banks to sign them. And in each case, the particulars of the companies in whose favour these credit facilities were granted would be properly typed out on the guarantees. However, in this instance, Ong insisted that when he signed the letters of guarantee there was only one signature on them, namely that of Lui. The other blanks in the letters of guarantee had not been filled in then. There was merely a cross in pencil against which he signed.

When asked how he knew that one of the letters of guarantee was in respect of credit facilities granted to Kim Produce, he said that Lui had told him so. He said he trusted Lui and that was the reason why he signed the blank letter of guarantee that morning.

On another point, although he had earlier confirmed both the signatures on the two guarantees, Ong denied having signed the letter of guarantee dated 23 June 1980 in respect of T Bin. When he was shown his signature, he denied that it was his. When he was questioned as to why he had not challenged the authenticity of his signature on obtaining copies of the letters of guarantee from the plaintiffs' solicitors, he replied that they were not very clear. When pressed further on this, Ong said he did not see the original letter of guarantee, and that he left these matters to his solicitors.

The last defence witness, DW3, testified that on the morning of 5 March 1980 Matsomoto had accompanied him to Ong's house to discuss with his father matters relating to their companies' affairs. A short while after they arrived, Lui came. Lui had brought some documents. They were letters of guarantee for Ong to sign. He said Lui had assured Ong that there would not be any risk as the credit facilities would be fully secured by way of fixed deposits in the sums of S$200,000 and S$350,000. He said his father was reluctant to sign and queried why the amounts of the credit facilities to be granted had not been filled in. To this, Lui replied that he would fill in the amounts later. Ong then signed the letters of guarantee.

Under cross-examination, DW3 said when he heard that the credit facilities would be fully secured, he under-

stood it to mean that the amount of the security was equal to the amount of the credit facilities granted. His own experience with banks was that in those circumstances they would still require guarantors. He conceded that on the basis of what Lui had said that day, his father would still nonetheless be exposed to liability for any interest incurred.

He was also cross-examined on the guarantee documents which his father had signed. He admitted that he did not have sight of the documents. Yet, he sought to give evidence of matters in the documents which he could not have known of. He was able to say that the guarantees came in four pages. He had sight of the front and back pages. He saw that the signature column was on the back page, the fourth page. He saw that the particulars of the guarantors had already been typed onto the back page. His father signed his name against his particulars. Lui had already signed his signature on that page and his particulars were also there. He could not, however, recall how many guarantors were required to sign that letter of guarantee. He said the first page of the letter of guarantee showed that the limits of the credit facilities had not been filled in. All that needs to be said of this evidence is that his observations on the letter of guarantee were wrong in material particulars.

Submissions

Counsel for Ong and Loi, Mr Cheong Yuen Hee, commenced his submission with a general observation that the circumstances in which the plaintiffs had obtained the signatures of the guarantors, including those of Ong and Loi, left much to be desired. He argued that the letters of guarantee should have been signed at the plaintiffs' banking premises and the signatures of each of the guarantors should have been witnessed by PW1, the plaintiffs' manager.

On the law, Mr Cheong relied on two main cases: *Avon Finance Company Ltd* v *Bridger & Anor*[1] and *Kingsnorth Trust Ltd* v *Bell & Ors.*[2]

In the *Avon Finance* case[1] the defendants were an elderly couple who purchased a house for their retirement. The arrangements for the purchase were undertaken by their son on their behalf. The son had promised the defendants that he would provide £2,500 towards their purchase of the house. In order to raise his share of the money, the son, without informing the defendants, obtained a loan of £3,500 from the plaintiff finance company on the security of his parents' property. In accordance with the terms of the loan agreement, the son undertook to procure the execution by the defendants of a legal charge on their property. He obtained his parents' signatures to the legal charge by telling them that the documents they were signing were connected with the mortgage with a building society. When the son's payment fell into arrears the plaintiffs commenced an action for possession against the hapless defendants. The trial judge dismissed the plaintiffs' claim on the ground that the defendants were entitled to rely on the defence of non est factum. Upon the plaintiffs' appeal, it was held by the Court of Appeal that the doctrine of non est factum had limited application and could only be relied on by a defendant where he had exercised reasonable care in the circumstances in connection with the transaction. On the facts, it was not possible in that case to find that the defendants had exercised such reasonable care as was appropriate in the circumstances. Accordingly, the defendants could not rely on the defence of non est factum.

However, the appeal was dismissed for two reasons. Lord Denning MR held that the court would not enforce a transaction entered into without independent legal advice where the terms of the transaction were very unfair and where there had been an inequality of bargaining power with undue pressure exerted on one party by or for the benefit of the other. In the case before him, the son had brought undue pressure to bear on his parents by misleading them as to the true nature of the documents. He did this, both for his own benefit and that of the plaintiffs. Accordingly, the defendants' bargaining power was impaired by their ignorance of the true situation. It followed, therefore, that the court would not uphold such a transaction.

The other reason was given by Lord Justices Brandon and Brightman. They said that the transaction was voidable in equity because (i) the plaintiffs had chosen to appoint the son, who was the debtor, to procure from his parents the security which was needed to further the transaction between the son and the plaintiffs, (ii) the relationship between the son and his parents was such that he could be expected to have some influence over them since they were his elderly parents, and that was a matter which the plaintiffs should have been aware of, and (iii) there was no independent advice given to the defendants. Accordingly, they held, the court would not enforce the transaction.

On the question of agency, in the *Kingsnorth* case[2] it was enunciated that where the creditor obtained, by way of security for the husband's indebtedness, a guarantee from his wife and entrusted the husband with the task of obtaining her signature, then the creditor was in no better position than the husband and would not enforce the guarantee against the wife if it was established that the execution of that document by her was procured by undue influence on the husband's part and she had not had independent advice.

The submission for Loi was this. He was illiterate in English. He was merely a nominal director. Lui had misrepresented to him the true nature of the documents

he had been induced to sign. He had received no independent legal advice. Upon discovery that he had signed guarantees, Loi immediately contacted PW1. Loi's conduct was, therefore, consistent with his allegation of misrepresentation by Lui. Also, Loi's own financial circumstances, being the owner of a sundry goods shop, were such that he could not have knowingly signed a guarantee exposing himself to a liability for over $2m. Moreover, he did not receive any benefit out of this banking transaction.

Counsel said that another perspective was that the plaintiffs knew that Loi was merely running a sundry goods shop and was certainly not worth S$2m. It was evident, therefore, that PW1 did not care how the signatures of the guarantors were procured.

With regard to Ong, counsel conceded that he knew he was signing the documents as a guarantor. However, Lui had misrepresented to him that the credit facilities to be granted by the plaintiffs in favour of the two companies would be fully secured by way of fixed deposits in the amounts equal to the limit of the credit facilities granted. Therefore, Mr Cheong submitted that the principles in the *Avon Finance* case[1] would equally apply to Ong, and he should also be absolved from liability.

Counsel for the plaintiffs, Mr Sarjit Singh Gill, submitted that as regards Loi's allegation of misrepresentation, he had failed to establish that Lui was the plaintiffs' agent. This was because Lui had not been given any authority to be the agent of the bank. He said the defence of non est factum, which Loi seemed to have relied on, did not apply where there had been negligence or carelessness on the part of the party seeking to rely on it. Loi was clearly careless or negligent when he signed the letters of guarantee. This was so because Loi knew romanized Malay and it was reasonable to infer that he would also be able to read the English words 'Signature of Guarantor'.

Moreover, Loi could read Chinese. If he had bothered to look at the heading of the letters of guarantee he would have seen the three Chinese characters. He would then have known that he was signing guarantee documents. Instead, Loi's reason for signing the documents, that Lui was a wealthy man in whom he had faith, showed that he had been careless. He had also failed to ask Lui anything about the documents he was asked to sign. Therefore, the defence of non est factum, which placed a heavy burden on a person seeking to rely on it, did not apply to Loi.

With regard to the law, counsel said the leading case of *Saunders* v *Anglia Building Society*[3] applied. It is not necessary to deal with the facts of that case save to say that it clearly established the rather restrictive parameters of the applicability of the plea of non est factum.

Counsel quite rightly submitted that on the application of the *Saunders* case,[3] both Ong and Loi would fail to establish this defence. With regard to the *Avon Finance* case,[1] he said, as it had made an inroad into the scope of the plea of non est factum, it should be kept within very narrow limits.

Coming to Ong, Mr Gill disputed the allegations made by him that the letters of guarantee had not been properly filled in before they were given to him to sign. He urged me to disbelieve his evidence. In fact, counsel said, Ong had been contradicted by his own son.

Counsel then referred to *United Dominions Trust Ltd* v *Western*.[4] There it was held, for the purposes of the doctrine of non est factum, one should not distinguish between the careless signing of a completed document and of a document in which there are blanks in respect of certain particulars. Further, in permitting someone else to complete the intended contractual document the onus was on the defendant to show that he had acted carefully.

The decisions

On the facts and the submissions made in this case, I was of the opinion that the principles in the *Avon Finance* case[1] should be applied to absolve Loi. My reasons are these. I accepted Loi's evidence on the crucial facts relating to the signing of the guarantees. He was a foolish man who had misplaced his faith in Lui. It seemed to me that Lui was an untrustworthy person who would not hesitate to use others to further his own ends. I found that there had been an inequality of bargaining power between Loi and Lui, and also, between Loi and the plaintiffs. There had been undue pressure exerted on Loi by Lui to obtain the guarantees.

When Lui requested Loi to sign the letters of guarantee, the latter was clearly under a misconception as to the true nature of the documents, for otherwise he would not have knowingly guaranteed loans in excess of $2m particularly when there was no benefit in it for him. One would have thought that Loi would have been told that he should get legal advice on the documents. In this instance, the fact is, Loi did not have the benefit of independent legal advice before he signed the guarantees. Finally, I was of the view that the circumstances in which the plaintiffs had obtained Loi's signatures on the guarantee documents without proper investigation of his means was unfair to him.

For these reasons, the plaintiffs' claim against Loi in these two suits cannot be sustained and I therefore dismissed them with costs.

In so far as Ong was concerned, the facts showed that he was in an entirely different position. As conceded by Mr Cheong, Ong knew he was signing letters

of guarantee. Ong was a very experienced businessman. In the course of his business, he had signed many guarantees. He knew what guarantees were all about. When he found himself liable to the plaintiffs under the two guarantees he tried to wriggle his way out by making unfounded allegations. He was not, in my view, a truthful witness. I was satisfied that both the letters of guarantee were signed by Ong on the morning of 28 March 1980.

There were other unsatisfactory features in Ong's defence. The first relates to the particulars in the guarantee documents. I agreed with Mr Gill that there were material contradictions between what Ong had said about the guarantees and what his son had said on them. It was impossible to reconcile both their evidence. Another, was Ong's evidence that he was misled by Lui's assurance that his liability was nominal. I disbelieved him when he said that Lui had assured him that ample security by way of fixed deposits would be placed with the plaintiffs for the credit facilities.

Plainly, the plea of non est factum was not available to Ong. Even the principles enunciated in the *Avon Finance* case[1] cannot apply to him. For reasons I have already given, there was no inequality of bargaining power. Clearly, the defence that had been put forward on his behalf cannot be sustained. I, therefore, entered judgment against Ong in favour of the plaintiffs as claimed in both suits. However, I ordered that the rate of interest payable to the plaintiffs should be at the prevailing rate at the material time rather than as prayed for.

Order accordingly.

Solicitors: *Shook Lin & Bok; YH Cheong.*

Reported by *Liu Hern Kuan*

Peck Constance Emily v Calvary Charismatic Centre Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 475 OF 1988
CHAN SEK KEONG J
11 JANUARY 1991

Companies and Corporations — Members — Removal — Plaintiff an ex-member of the defendant company — Removed as member pursuant to defendants' EGM and board meeting — Whether such board meeting ever took place — Whether board meeting contravened rules of natural justice and/or article in defendants' articles of association — Applicability of natural justice rules to corporations

Criminal Law — Standard of proof — In relation to an averment of a crime in civil proceedings — Balance of probabilities — Penal Code (Cap 224, 1985 Ed), ss 120A, 191, 192 & 193

The action was commenced by the plaintiff who sought a declaration that she was still a member of the defendant company which was a company incorporated by guarantee under the Companies Act (Cap 50, 1990 Ed). The defendants or the members collectively are a church.

The defendants' church board became aware in 1987 of serious accusations being made by the plaintiff against the senior pastor and the leadership of the church. The defendants claimed that various attempts were made to counsel her but these were to no avail. At an extraordinary general meeting ('EGM') of the defendants it was voted that the plaintiff be removed as a member of the defendant company. This decision was also resolved at a subsequent board meeting.

The plaintiff's action, when commenced, was founded on the alleged invalidity of the resolution passed at the EGM of the defendants which purported to remove the plaintiff as a member, and the non-existence of an alleged board meeting which also resolved to remove the plaintiff as a member of the defendant company. The defendants conceded that the EGM resolution was not legally effective to remove the plaintiff as a member. The plaintiff then proceeded with this action on the bases that: (i) there was no board meeting and (ii) if there was, it was null and void on the grounds that (a) it failed to comply with art 9 of the defendant company's articles of association in that no persistent efforts had been made to win her back to the standard of faith and conduct required of an ordinary member of the church; and/or (b) it contravened the rules of natural justice, viz, (i) the right to be heard by an unbiased tribunal; (ii) the right to have notice of the charges of misconduct; and (iii) the right to be heard in answer to those charges.

Held, dismissing the plaintiff's action with costs:

(1) From the evidence and the plaintiff's conduct during the pre-trial stage there was no reason to believe that the board meeting was fictitious. Furthermore, the internal evidence lent support to its existence. The minutes of that board meeting showed that the board not only ratified the EGM resolution but also passed its own resolution to remove her.

(2) The plaintiff's charge against the defendants was no less than that the members of the church board had committed the following criminal offences in order to secure her removal as a member of the defendants:

(i) giving false evidence under s 191 of the Penal Code (Cap 224, 1985 Ed) ('the Code');
(ii) fabricating false evidence under s 192 of the Code;